

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM TWOMBLY
Claimant

VS.

TRI-STATE EXTERMINATING, INC.
Respondent

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Docket No. 228,039

ORDER

Both parties appealed the December 28, 2000 Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on June 13, 2001.

APPEARANCES

Jeffery A. Mason of Goodland, Kansas, appeared for claimant. Gerald O. Schultz of Garden City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Decision.

ISSUES

This is a claim for medical benefits and temporary total disability benefits for a June 3, 1996 accident and an alleged right shoulder injury. In the December 28, 2000 Decision, Judge Fuller denied claimant's requests for benefits after finding that claimant had failed to provide respondent with timely written claim for workers compensation benefits.

Claimant contends Judge Fuller erred. Claimant contends written claim was timely as it was made within 200 days of claimant's last treatment with Dr. Holmes, whom claimant contends was impliedly authorized to provide medical treatment. In the alternative, claimant argues that respondent failed to file an accident report with the Division of Workers Compensation and, therefore, the time for providing written claim was extended to one year from the date of accident. Claimant requests the Board to reverse the Judge's finding on timely written claim and order respondent to pay the medical

expense incurred for the shoulder treatment and award him eight weeks of temporary total disability benefits.

Respondent also contends Judge Fuller erred. Respondent contends the Judge erred by finding claimant injured his shoulder at work and by finding claimant provided respondent with timely notice of the accidental injury. Therefore, respondent requests the Board to find that claimant (1) did not injure his shoulder while working for respondent, (2) did not provide timely notice of the accident, and (3) did not provide respondent with timely written claim. Respondent requests the Board to affirm the Judge's denial of benefits.

The issues before the Board on this appeal are:

1. Did claimant injure his right shoulder while performing work for respondent?
2. If so, did claimant provide respondent with timely notice of the accidental injury?
3. If so, did claimant provide respondent with timely written claim for benefits?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. The Board affirms the Judge's finding that claimant injured his right shoulder on June 3, 1996, while pulling a termite rig out of a pickup. The accident occurred while claimant was performing his regular work duties for respondent, an exterminating company.
2. At the time of the incident, claimant felt that he had merely pulled a muscle and did not seek immediate medical treatment. But on June 12, 1996, claimant saw Dr. Austin in Goodland, Kansas, and received a cortisone injection. According to claimant, the doctor diagnosed bursitis.
3. Sometime between the June 3, 1996 accident and the June 12, 1996 office visit with Dr. Austin, claimant told respondent's owner, Floyd Studer, that he was hurting himself lifting the termite rig in and out of the pickup by himself. Although Mr. Studer denies remembering that particular conversation, he does recall claimant telling him after learning about the shoulder injury "something about moving some machinery." Mr. Studer also remembers telling claimant at some point in time that he should have his shoulder checked out.
4. Shortly after claimant had seen Dr. Austin on June 12, 1996, claimant spoke with Mr. Studer's aunt, Joan Beal, and told her that he thought he had injured his shoulder lifting the termite rig out of the pickup but that Dr. Austin thought it was only bursitis. Ms. Beal maintained an office in the same building as respondent and performed some accounting

and secretarial services for respondent. When Mr. Studer was not available, Ms. Beal was the appropriate person to notify regarding respondent's business matters.

5. Following the June 3, 1996 accident, claimant told Mr. Studer on several occasions that pulling drills out of concrete and drilling holes for injecting chemicals were aggravating his shoulder.

6. After seeing Dr. Austin, claimant's shoulder was not improving. Therefore, claimant then scheduled an appointment with another doctor, Dr. Holmes of Denver, Colorado. Claimant spoke with Mr. Studer about seeing Dr. Holmes, who had previously treated Mr. Studer for a rotator cuff tear in the shoulder. After evaluating claimant in August 1996, Dr. Holmes determined that claimant had a torn rotator cuff, which required surgery. According to claimant, he told Dr. Holmes that he injured his shoulder lifting the termite rig.

7. Claimant advised Mr. Studer that he needed surgery. They then discussed whether claimant's wife's health insurance carrier would pay for the medical treatment and agreed that claimant would file the bills with the health insurance carrier and Mr. Studer would pay claimant his wages while he was off work.

8. Dr. Holmes operated on claimant's shoulder in October 1996. Claimant filed the medical bills with his wife's health insurance carrier but they were denied as claimant had written on the claims that he had sustained a work-related injury. When claimant told Mr. Studer that the health insurer denied payment, Mr. Studer stated that he did not know what to do about it and that he had let his workers compensation insurance lapse.

9. Following surgery, claimant was off two months. Mr. Studer paid claimant his wages while he was off work but deducted the time from claimant's accrued vacation leave and accrued sick leave. Additionally, Mr. Studer required claimant to sign a loan document for the balance of the last pay period.

10. On February 17, 1997, claimant attempted to serve Mr. Studer with a written claim for workers compensation benefits. But Mr. Studer refused to accept the document. Claimant's attorney later mailed the document to respondent, with respondent receiving it on March 4, 1997.

11. Despite respondent's knowledge of claimant's June 3, 1996 shoulder injury and knowledge of claimant's visits to the doctors, respondent failed to file an accident report with the Division of Workers Compensation. Further, respondent never authorized claimant to seek medical care.

12. Other than going for doctor visits, claimant missed no time from work between June 3, 1996, and his right shoulder surgery on October 24, 1996.

13. Dr. Holmes eventually released claimant to return to work. When claimant and Mr. Studer could not agree whether the shoulder injury was work-related or not, claimant terminated his employment.

CONCLUSIONS OF LAW

1. The Decision should be reversed to grant claimant medical benefits and temporary total disability benefits.

2. Claimant's June 3, 1996 accident arose out of and in the course of employment with respondent.

3. The Board affirms the Judge's conclusion that claimant provided respondent with timely notice of the accidental injury. Claimant's testimony is persuasive. Respondent had notice of the June 3, 1996 accident within 10 days, as required by the Workers Compensation Act.¹

4. The Board concludes that claimant provided respondent with timely written claim for benefits. Claimant's shoulder injury partially incapacitated him for more than the remainder of the day upon which he was injured as the injury required him to seek medical treatment that ultimately culminated in shoulder surgery and missing work. Therefore, respondent was required, but failed, to file an accident report with the Division of Workers Compensation.²

5. The failure to file the accident report with the Division of Workers Compensation extended claimant's time to serve respondent with written claim to one year from the date of accident.³ Therefore, the written claims presented to respondent in February 1997 and March 1997 were timely.

6. At oral argument before the Board, respondent maintained that claimant should not be permitted to argue for the first time on appeal that the time for serving written claim was extended by respondent's failure to file an accident report. The Board disagrees. The Board concludes that written claim was an issue before the Judge and, therefore, the time period for serving written claim was encompassed within that issue.

7. Based upon the above, claimant is entitled to medical benefits for the right shoulder injury. Because respondent did not select a health care provider, respondent is

¹ K.S.A. 44-520 (Furse 1993).

² K.S.A. 44-557(a) (Furse 1993).

³ K.S.A. 44-557(c) (Furse 1993).

responsible for the medical bills incurred, subject to the regulations adopted by the Director of the Division of Workers Compensation.⁴ Claimant is also entitled to eight weeks of temporary total disability benefits.

AWARD

WHEREFORE, the Board reverses the December 28, 2000 Decision and grants claimant all reasonable and related medical expenses. Further, the Board awards claimant eight weeks of temporary total disability benefits at \$246.17 per week for a total of \$1,969.36.

The Board adopts the remaining orders set forth in the Decision that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffery A. Mason, Goodland, KS
Gerald O. Schultz, Garden City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director

⁴ K.S.A. 1996 Supp. 44-510(b).